Before James S. Margolin, Arbitrator
IN THE MATTER OF THE ARBITRATION OF

)

SANDRA DUBROC,
Grievant,
v. FMCS Grievance No. 06-57876

AQUILA, INC.,
Respondent.

APPEARANCES:

Jeffrey D. Hanslick
BLACKWELL SANDERS PEPER MARTIN
for the Company

Michael A. Baker
For the Union

OPINION AND AWARD

THE GRIEVANCE

The subject grievance and desired settlement was filed on April 27, 2006, and stated in part as follows:

> "Nature of Complaint: I believe the Company does not have just cause to terminate my employment and such action is in violation of but not limited to, Article 2 Section 1 and Article 3 Section 2 of the current Working Agreement.
>
> As a resolve [sic] to this grievance, I want to be made whole in regards including but not limited to, reinstatement to my position, reinstatement of all my benefits, my record cleared of this incident, full back pay, and reimbursement for any and all out of pocket expenses caused by my unjust termination."

COMPANY ACTION

The Company's response to the subject grievance stated as follows:

"No contract violation. Grievance denied."

STATEMENT OF ISSUE

The parties stipulated to the issue before the Arbitrator as follows:

"Whether Employer had just cause under Article 3 Section 2 of the CBA to terminate Grievant's employment on or about April 18, 2006. If no, then what is the proper remedy."

RELEVANT CONTRACT LANGUAGE

ARTICLE 2 - MANAGEMENT RIGHTS

Section 1. Except as limited by some provision of this Agreement, management shall retain all of the rights to manage the property and its business as they traditionally existed prior to a contract.

ARTICLE 3 -Discipline, Discharge and Probationary Period

Section 1. All new employees shall be probationary employees for the first six (6) calendar months of employment. During this period, all matters of discharge or discipline shall be at the sole discretion of management. Probationary employees may not file grievances or make any claim of violation of this Agreement.

Section 2. Employees who have completed their probationary period will not be demoted, disciplined or discharged except for just cause. If such an employee is suspended or discharged, the Division will provide the employee with a written statement as to the reasons therefore and the Union will be provided a copy of the statement.

Section 3. If it is determined that an employee has been demoted, disciplined or discharged without just cause, the employee shall have his record cleared of such charges, shall be reinstated to his position, and, in the case of lost wages, shall be reimbursed for such loss. Seniority rights shall not be taken away as a disciplinary matter except as may be incident to a discharge for just cause.

Section 4. If during the course of an investigation by the Human Resources Department it becomes reasonably apparent that an employee may become subject to disciplinary action, the employee will be advised that, if he chooses, he may have a Union representative present at any interview conducted by the Division.

Section 5. An employee who has not incurred disciplinary action, including verbal reprimand, for a period of two (2) consecutive years of active employment shall be entitled to have any disciplinary action prior to such period disregarded by the employer. Otherwise, the employer shall be entitled to consider all events occurring up to four (4) years prior to the incident in question. Substance abuse return to work agreements are exempt from this section.

ARTICLE 4 - Grievance and Arbitration

Section 2. All differences which are not settled as hereinbefore provided, including differences on proposed amendments, as submitted in accord with Article 29, Sections 1 and 2 hereof, shall be submitted at the request of either or both parties to arbitration as follows:

(a) The party desiring arbitration shall give a written notice to the other stating the issue proposed for arbitration. Absent an agreement as to the name of an arbitrator, the parties shall arrange for a list of arbitrators from the Federal Mediation and Conciliation Service or such other agency as they may mutually agree upon.

(b) Within five (5) days after receipt of the list of arbitrators, the Division and Union shall arrange to alternately strike names from the list provided, with the last remaining name to be the arbitrator.

(c) Each party will bear the expense of preparing and presenting its own case to the arbitrator, and any other incidental expense mutually agreed to in advance shall be borne equally by both parties.

STATEMENT OF FACTS AND BACKGROUND

This matter came before Arbitrator James Margolin on August 28 2007. During the course of the hearing both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses. The parties elected to file post-hearing briefs. The Arbitrator received postmarked briefs from both parties. The parties stipulated that the grievance and arbitration were properly before the Arbitrator, that the Arbitrator has jurisdiction to resolve the issue under the collective bargaining agreement and to make any award, if any, in accord with the CBA.

The Grievant, Sandra Dubroc, was an employee of Aquila, Inc., dba, Missouri Public Service for approximately twenty-two years. She had been a Swing Meter Reader/Groundman (Meter Reader) and was employed by the Company in that capacity for eight years in the Sedalia, Missouri area. She had served the employer previously in other classifications, but it is the Meter Reader classification she held from which she was terminated.

The primary duty of the meter reader is to read the electric meters of the Company's electric customers and manually enter that information into a handheld device called the ITRON, which is then used to download its stored information into Company computers for billing purposes. The Company provides the ITRON as well as other equipment to aid the meter reader in acquiring meter reads. Other equipment provided by the Company includes vehicles and telescopic "scopes" to read the dials of electric meters. Scopes are either of the monocular or binocular type. As a meter reader, Ms. Dubroc was, wherever possible, to walk to the meter, read it, and verify it had not been tampered with to ensure that no diversion had occurred. Ms. Dubroc was not to read meters from her truck using a scope or binoculars unless absolutely necessary because of foliage, a fence, or an animal.

Throughout her employment, Ms. Dubroc exhibited various performance issues, including before Mr. Bergeson became her supervisor, who Ms. Dubroc claimed was "out to get her". The evidence established that the Company followed the provisions of Article 3 Section 5 of the Working Agreement between Aquila, Inc. d/b/a Missouri Public Service and IBEW Local Union No. 814 ("CBA"), and considered only her performance issues after April, 2002 in deciding to terminate Ms. Dubroc's employment in April 2006. They included the following informal counselings and formal disciplinary actions:

Informal Counselings

- April 24, 2002, counseling for "leaving her work assignment to assist with a gas leak and for picking flowers and rescuing rabbits from predators".
- June 18, 2002, counseling as a result of a customer complaint about damage Ms. Dubroc had caused by leaving his driveway when reading his meter.
- July 1, 2002, counseling for telling co-workers she believed the Company was "out to get her."
- August 21, 2002, counseling for not completing her routes properly.
- September 26, 2002, counseling for attempting to falsify Department of Transportation Hazardous Materials Awareness Testing.

- September 30, 2002, counseling regarding her reaction to a change in her work assignment.
- July 12, 2004, counseling for reading meters with binoculars from the center of the road.

Formal Disciplines

- November 11, 2003, verbal counseling for taking money from a customer's yard without permission. (This was not the Grievants first counseling for taking things that did not belong to her and/or to Aquila when she was supposed to be reading meters as she received a letter in her file for taking wood from a yard on 12-04-97).
- April 14, 2004, suspension for one day for entering a customer's home without permission and "hugging" a customer. Union Steward Ralph Eye told the Grievant on that occasion, " I think you are pretty damn lucky to get off with a one-day suspension and still have a job." The Company stated its fear that the Grievant's conduct placed the Company at risk of liability for, at a minimum, trespass and battery.
- March 22, 2005, suspension for 3 days for leaving her route to talk with a third party, a Mr. Triplett, about a home she was looking at with her boyfriend and about the personal life of her boyfriend. The Company stated that it feared that the Grievant's conduct with Mr. Triplett's girlfriend placed it at risk for legal action.

At the hearing, the Union complained that Aquila had considered informal counselings in formally disciplining the Grievant, however Company testimony was clear that the Grievant's formal discipline was the result of the conduct that preceded each formal disciplinary action. Whether or not the informal counselings were considered in terminating the Grievant is of no matter since the formal disciplinary actions were justification enough to justify her termination.

When Company representatives met with the Grievant regarding each of the issues identified above, she had an illogical excuse as to why her conduct was either acceptable and/or as to why whatever happened was not her fault. Indeed, it appears that this was a pattern with the Grievant, wherein Mr. Bergeson explained "She denies doing anything wrong in all of them, even though there is evidence to the contrary." In that pattern, the Grievant often provided the Company with

what it concluded was false information, including with regard to the formal discipline described above:

- Regarding the November 11th discipline, the Grievant told the Company that the money she took without permission was not in the customer's yard but was either in the street or on the front sidewalk,
- Regarding the April 14th discipline, when the Grievant was describing the situation regarding hugging the customer, she told the Company that "Mary" was a friend (which was not even the customer's name) and had invited her in.
- Regarding the March 22nd discipline, the Grievant told the Company that she knew the person in question and/or did not know her, that she knew Paul Triplett and/or did not know him, that she was friends with Paul Triplett and he had coached her daughter and/or that he was "out to get her," "had a drinking problem," "had been in and out of jail," and "used drugs."

In the context of the foregoing, the Company received yet another complaint from a customer about the Grievant in April, 2006. Specifically, the Company received a complaint from a fixed-income customer that his meter reader would not get out of the car to read meters, but instead simply read them from the car, which the customer believed, and the Company confirmed, had led to false readings and, on at least two occasions, to unusually large bills the following month.

It is evident to the Arbitrator that the Company thoroughly investigated all the forgoing complaints against the Grievant. In so doing, the Company concluded that, no matter what it did, the Grievant simply could not or would not abide its instructions and meet its expectations. The Arbitrator agrees, and offers this observation during the arbitration hearing that it was apparent to the Arbitrator that the Union Representative at the hearing was unable to control the Grievant, despite his valiant and vigorous efforts to do so. Although the Union representative was highly skilled in his representation of the Grievant at hearing, there is nothing more that he could have done to rebut the Company's compelling evidence.

UNION POSITION

The Union seems to be suggesting in its post hearing brief that the Arbitrator should employ the unusually high standard of proof of beyond a reasonable doubt. The Arbitrator disagrees, however were he to hold the Company to that standard of proof, he would still conclude that the Grievant was terminated for just cause.

COMPANY POSITION

The Company argues that it had just cause to terminate the Grievant, that it thoroughly and fairly investigated and confronted the Grievant concerning all the incidents at hand, and that the Grievant knew or should have known that she her actions would result in termination of employment.

ANALYSIS

The Arbitrator first must determine whether the Grievant was afforded substantive and procedural due process by the company in its decision to suspend and terminate the Grievant, and justified its decision at hearing. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he or she was discharged or disciplined. The basic due process rights of the Grievant include whether there is a company policy that clearly defines and puts an employee on fair notice of prohibited conduct and if it is administered consistently, whether the Grievant was informed of the charges against him, whether he was afforded the opportunity to confront his accusers to answer charges, and if he was afforded the right to union representation. The evidence at hearing supports the conclusion that the Grievant's due process rights were not abridged including that the Company was consistent in administering its policies.

The Arbitrator must also "…attempt to balance the interests between the parties. They [arbitrators] consider the right of the employee to his job to be of considerable importance and will overcome it only where the employer has suffered some detriment." *Gardner-Denver Co*.,

65 LA 82, at 87 (Wheeler, 1991). *Bracketing added*. The totality of the circumstances, and the credibility of the witnesses, are paramount factors to weighed by the Arbitrator. Included in this Arbitrator's analysis are the demeanor of the witnesses, perceived bias, personal or business interest or motive, contradictions to the witness's testimony, capacity to recall events and opportunity to perceive events. These factors bear directly on the credibility of a witness in evaluating the testimony and then allocating the proper weight to the testimony.

"The self interest of a witness is the greatest for those who stand to gain or lose from the decision of the Arbitrator. Obviously, the Grievant's job is at stake. However, his supervisors are equally interested since their reputation and judgment is subject to approval or disapproval. The Arbitrator must carefully consider all the circumstances that would tend to create bias on the part of any witness, and weigh such testimony with what other witnesses stated. When choosing between conflicting testimony, the version of events that is most reasonable, and corroborated by other witnesses, is the most credible." *Aramark Corp. and Retail, Wholesale And Department Store Union Local 1064*, 30 LAIS 1001 (Allen, 2002).

The ultimate objective of requiring an employer's actions to comport with the "just cause" standard is to ensure that the employer's actions are reasonable and fair to the employees.

> If the discharge was 'fair and equitable' and 'for good and sufficient reason', it must be sustained. 'Equitable' is synonymous with 'fair', and 'good' is defined as 'valid' and 'unobjectionable'. Each of these words is somewhat decisional in nature, but generally speaking, they must be held to mean that which is conformable to the principles of what is right and just, and consideration of the facts and circumstances presented by the individual case.

Olin Mathieson Chemical Corp., 49 L.A. 573, 575 (Bellshaw, 1967).

> "The just cause standard of review requires consideration of whether an accused employee is in fact guilty" of the misconduct alleged. If so, then "another consideration, unless contractually precluded, is whether the severity of disciplinary action is reasonably related to the seriousness of the [misconduct] and the employee's prior record.
>
> ***
>
> "The just cause standard has been seminally defined by Arbitrator Carroll Daugherty, and incorporates the following seven tests: 1. Did the company give the employee

> forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct? 2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee? 3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? Was the company's investigation conduct fairly and objectively? 5. At the investigation, did the 'judge' obtain substantial evidence or proof that the employee was guilty as charged? 6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees? 7. Was the degree of discipline administered by the company in particular case reasonably related to (a) the seriousness of the proven offense and (b) the record of the employee in his service with the company?" *Lehigh Cement Co.*, 122 LA 643 (Gaba 2006).

Under the *Lehigh Cement* analysis, the evidence at hand is compelling that Company has satisfied all seven just cause tests. An employee is "insubordinate" if (1) her refusal to obey is knowing, willful, and deliberate; (2) the order is explicit and clear; (3) the order is reasonable and work-related; (4) the order was given by someone with appropriate authority; (5) the employee knew of the consequences for disobedience; and (6) only if practical, the employee is given an opportunity to correct his behavior. *See* Discipline *& Discharge in Arbitration* at 156–57. Under that analysis the Grievant indeed was insubordinate and her discharge was warranted due to the seriousness of his conduct.

> In resolving divergent claims and factual testimony, arbitrators are allowed to credit the testimony of disinterested witnesses over that of a grievant, absent a showing that witnesses called on behalf of the employer had a motive to lie. . . . . [A]n accused employee has an incentive of denying a charge, in that the employee stands immediately to gain or lose in the case . . . . [I]f there is no evidence of ill will towards the accused on the part of the accuser and if there are no circumstances upon which to base a conclusion that the accuser is mistaken, the conclusion that the charge is true can hardly be deemed improper. . . . [T]he incentive of the grievant to lie in a discipline arbitration case is obvious. A Grievant's job tenure and financial security are at stake, whereas no such motivation confronts the employer's supervisory personnel or no the part of independent witnesses, especially those who are not employees of the Company. A grievant's continued job tenure is sufficient motivation, in and of itself, to lie. Contrary to the

> grievant in the case at hand, none of the witnesses called by the Company had any incentive to place their credibility on the line simply to sustain his discharge. *Beauvois Manor on the Park*, 117 LA 1729 (King, Jr. 2003) (quoting Elkouri & Elkouri, *How Arbitration Works* 445-46 (5th edition, 1997)).

There was no credible evidence in this case of ill-will toward the Grievant, nor the Company acting in an arbitrary or discriminatory manner in adhering to its past practices. In *Libby, McNeill & Libby*, 53LA188, 190 (1969), the arbitrator held where there was no clear showing that the company acted arbitrarily, discriminatorily, prejudicially or with bias, management's position should be sustained in matters of discipline. (Citing additional authorities, i.e. *Cohen Products Refining Co.*, 21LA105; *Bauer Brothers Co.*, 23LA696; and *Solar Aircraft Co.*, 32LA126 (20).

***

> The nature of the act resulting in the termination is determinative of the quantum of proof required. *Super Valu Stores, Incorporate and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 394*, 74 LA 939 (Evenson, 1980). The appropriate quantum of proof in this case is a preponderance of the evidence standard. See Wholesale Produce Supply Co., 101 LA 1101 (Bognanno, 1993) (Company need only prove by a preponderance of evidence that it properly discharged employee for dishonesty, because labor arbitration is not a criminal court of law and reliance on standard of beyond a reasonable doubt is inappropriate); accord *Brand & Draznin*, Discipline and Discharge in Arbitration, Bureau of National Affairs, 2001 Supp., pg. 73 (Examining cases involving quantum of proof in dishonesty cases and concluding cases examined employed preponderance of the evidence standard).

The Arbitrator believes that the appropriate quantum of proof in this case is a preponderance of the evidence standard. See Wholesale Produce Supply Co., 101 LA 1101 (Bognanno, 1993) (Company need only prove by a preponderance of evidence that it properly discharged employee because labor arbitration is not a criminal court of law and reliance on standard of beyond a reasonable doubt is inappropriate); accord *Brand & Draznin*, Discipline and Discharge in Arbitration, Bureau of National Affairs, 2001 Supp., pg. 73 (Examining cases involving quantum of proof in dishonesty cases and concluding cases examined employed

preponderance of the evidence standard). Indeed, even if allegations of criminal behavior against Grievant had been raised, proof beyond a reasonable doubt is inappropriate. *Elkouri & Elkouri*, How Arbitration Works, 6th Ed., Ch. 15.3D.ii.a., pg. 951-952 (In cases of potentially unlawful conduct, the greater weight of authority favors 'clear and convincing evidence' or 'preponderance of the evidence,' as opposed to 'beyond a reasonable doubt.'); accord R.M. Kelly, *The Burden of Proof in Criminal Offenses or "Moral Turpitude" Cases*, 46 Arb. J. 45 (Dec. 1991). As noted by one well recognized arbitration treatise,

> "Proof beyond a reasonable doubt, the recognized standard in criminal proceedings, is of dubious utility in arbitration, even in cases that involve actions of 'moral turpitude.' While arbitrators will, on occasion, insist that this most stringent standard should apply in cases involving discharge for events that may be criminal in nature, on the basis that a finding of just cause may crate an impairment to the grievant's reputation and future employment, it does not represent the prevailing rule."

Bornstein, Gosline, Greenbaum, Labor and Employment Arbitration, 2nd Ed., Matthew Bender, § 5.06[1] (2005).

This treatise continues that,

> "There was, at one time, a fair representation of arbitration decisions that came down squarely in support of the proposition that cases involving accusation of moral turpitude or criminal conduct required proof beyond a reasonable doubt. [citations omitted] Today, parties are unlikely to persuade an arbitrator that a degree of proof that is, by operation of law, applicable to the government only in criminal matters where the defendant faces loss of liberty, should likewise attach to an issue of just cause under a private collective bargaining agreement. [citations omitted] If any answer to the question is needed, it is almost certainly the 'clear and convincing evidence' standard that will be applied (either expressly or by implication) by arbitrators in cases involving accusations of criminal conduct or moral turpitude. Otherwise, the result may be anomalous as well as unfair, as employees charged with lesser offenses might more readily be discharged because the employer's burden in such a case is less stringent. *See* R.M. Kelly, *The Burden of Proof in Criminal Offenses or 'Moral Turpitude' Cases*, 46 Arb. J. 45 (Dec. 1991)."

AWARD

The Employer has satisfied its burden of proof by a preponderance of evidence that it terminated the employment of the Grievant for just cause and, therefore, the grievance is denied.

IT IS SO ORDERED THIS 10th Day of December, 2007, by

_____

JAMES S. MARGOLIN, ARBITRATOR